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FAMILY LAW: CASES AND MATERIALS

edited by

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VOLUME 1

The materials produced
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CHAPTER 1

INTRODUCTION

1. The Constitution

The British North America Act grants exclusive legislative jurisdiction to the provinces with respect to some aspects of family law and to Parliament with respect to others. Under s. 91 of the Act, Parliament has exclusive jurisdiction over marriage and divorce (s. 91(26)) and criminal law (s. 91(27)). The provinces are given exclusive jurisdiction in relation to the solemnization of marriage (s. 92(12)) and property and civil rights in the province (s. 92(13)). As interpreted by the courts these sections result in the province having legislative authority over the formalities of marriage, while the federal government has authority over the capacity to marry, and marriage status. Maintenance and custody are topics within the provincial legislative jurisdiction, but come within the federal power when dealt with as a corollary matter to divorce.

For a fuller discussion of the constitutional issues, and the problems that arise because of the division of powers, see: Fodden: Canadian Family Law: Cases and Materials (1977) pp. 1-3, 1-8.

II. Court System

The British North America Act also divides constitutional power with respect to the establishment of courts which deal with family problems. Under s. 96 of the Act, the federal government is given exclusive jurisdiction to appoint Superior, District and County Court judges in each province. On the other hand, the province is given authority under s. 92(14) over the administration of justice in the province including "the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and of

Criminal jurisdiction." As a result a number of courts deal with family matters.

- (1) The Provincial Court (Family Division), commonly referred to as the "Family Court"

Part III of The Provincial Courts Act provides for the establishment of a Provincial Court (Family Division) in each county and district throughout Ontario, and sets out the Court's jurisdiction. The Provincial Court (Family Division) is both a Juvenile Court and a Family Court. As a Juvenile Court it has all the powers vested in such a court by the Juvenile Delinquents Act, and also has power to try any child charged with an offence against provincial laws.

As a Family Court, it has general jurisdiction to deal with all cases where jurisdiction is conferred by any Act on a Juvenile Court, a Juvenile and Family Court, or on a Provincial Court (Family Division). This includes the enforcement of Supreme Court alimony and maintenance orders. The Provincial Court (Family Division) also has jurisdiction to make an order of supervision or wardship for a child in need of protection under The Child Welfare Act and to make an affiliation order against the father of an illegitimate child under that Act. It also shares jurisdiction with other courts under The Family Law Reform Act. Essentially it can, under that Act, deal with questions of custody and support, but not with family property.

There are 53 Family Courts in Ontario (including the Unified Family Court in Hamilton), 4 of which are located in Metropolitan Toronto, the main one being at 311 Jarvis Street, and the others being located in Scarborough, Willowdale and Etobicoke. Twelve of the courts are both family and criminal courts.

(2) County and District Courts

Judges of the County and District Courts have jurisdiction over divorce, including maintenance and custody when they occur as corollary relief in a divorce action, as local judges of the Supreme Court by virtue of s. 18(13) of The Judicature Act. County and District Courts also have jurisdiction, together with the Supreme Court, over adoption (Part IV of The Child Welfare Act). They also have full jurisdiction under The Family Law Reform Act.

(3) Surrogate Courts

Judges of the Surrogate Court have exclusive jurisdiction over guardianship under The Infants Act and concurrent jurisdiction with the Supreme Court in applications for custody of children under that Act.

(4) Supreme Court of Ontario

Under The Divorce Act, the Trial Division of the Supreme Court has jurisdiction over divorce and corollary matters of alimony, maintenance and custody. As mentioned above, County and District Court judges share this jurisdiction as local judges of the Supreme Court. The Trial Division of the Supreme Court also has concurrent jurisdiction with the County and District Courts over adoption under The Child Welfare Act and full jurisdiction in all matters arising under The Family Law Reform Act.

The fragmentation and overlapping of jurisdiction of the various courts does not always make sense and sometimes creates great difficulties for members of the public. The Law Reform Commission of Canada in 1974 had this to say about the situation:

"[It] not only leads to multiplication of effort, but can produce irreconcilable decisions. 'Forum shopping' can also develop from the existing situation ... Present systems

cause duplication of effort by judges, lawyers, witnesses, court administrators and the parties themselves and this naturally leads to increased costs ... [T]he process denies any one court the opportunity to view the problems as a whole ... [This system] encourages distrust of the legal process as a means of solving family problems."

The Commission recommended the establishment of a unified Family Court to be given jurisdiction over all aspects of family law. The constitutional difficulties (the jurisdiction exercised by County and Supreme Court judges could only be exercised by judges appointed by the federal government and the split legislative jurisdiction meant that no one province could unify or rationalize all family law) created some delay in acting on this recommendation.

The development of the Unified Family Courts is outlined in this excerpt from Fodden: Canadian Family Law Cases and Materials

(1977) pp. 1-14, 1-15

...
- Encouraging diversity in approach, the Law Reform Commission of Canada saw three basic alternatives "respecting the status and place of a unified Family Court in the judicial structure." (*Working Paper No. 1, The Family Court*, 1974, p.26):

"-- A unified Family Court may be set up as a separate court of superior jurisdiction, or as a part or division of the existing superior court.

"-- A unified Family Court may be created as a division of the existing county or district courts.

"-- A unified Family Court could be created as a division of the existing provincial court system."

Almost every province is embarked on the creation of a unified Family Court based on a variation of one of these three alternatives.

Prince Edward Island, for example, has chosen the first solution. Because of its smallness, P.E.I. need not worry greatly about the problems of accessibility and staffing which elsewhere militate against this approach. The *Supreme Court Reorganization Act*, S.P.E.I. 1975, c.27, simply abolishes the County Courts and creates three divisions in the Supreme Court: the Estates Division, the Family Division, and the General Division. Jurisdiction over all family law matters is given to the Family Division. At present, one judge handles all of the matters presented to the Family Division.

British Columbia has pursued a combination of the first and third alternatives. A Unified Family Court pilot project was established in Delta, Richmond, and Surrey in 1974. Under the British Columbia scheme the family law operations of the Supreme Court and the County Court were brought into the same building as the Provincial Court (Family Division). Procedures were established for integrating the work of these various courts to minimize delays and technicalities. And wherever possible, emphasis was given to the role of the Provincial Court. The *Family Relations Act*, S.B.C. 1972, c.20 was amended (S.B.C. 1974, c.99, s.5) to put the Provincial Court in a position to make full custody orders